Robert L. Hyde, Esq. (SBN: 227183)
bob@westcoastlitigation.com
Joshua B. Swigart, Esq. (SBN: 225557)
josh@westcoastlitigation.com
David C. Leimbach (SBN: 265409)
dleimbach@westcoastlitigation.com
HYDE & SWIGART
411 Camino Del Rio South, Suite 301
San Diego, CA 92108-3551
Telephone: (619) 233-7770
Facsimile: (619) 297-1022

Attorneys for Chris Melingonis,
Individually and on Behalf of All
Others Similarly Situated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Chris Melingonis, Individually and on Behalf of All Others Similarly Situated Plaintiffs, v. **Network Communications International Corp., d.b.a. 1-800-CALL-4-LESS** Defendant.	**Case Number:** **10-cv-1364 MMA NLS** **Response In Opposition To Defendant's Motion To Dismiss First Amended Complaint Pursuant to FRCP 12(b)(6)** **Date:** November 30, 2010 **Time:** 2:30 PM **Ctrm.:** 5 **Judge:** Hon. Michael M. Anello

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I. INTRODUCTION

Plaintiff Chris Melingonis (hereinafter "Plaintiff") hereby opposes Defendant Network Communications International Corp.'s, d.b.a. 1-800-CALL-4-LESS (hereinafter "Defendant") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Defendant's Motion") for the reasons set forth in this Opposition. As relevant to this Motion, the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)(iii) (the "TCPA") prohibits any calls made to cell phones featuring a prerecorded voice message unless the called party has given permission by "prior express consent" to allow receipt of such calls. Plaintiff has filed this class action lawsuit alleging that Defendant has repeatedly called individuals on their cell phones featuring prerecorded voices in violation of the TCPA. Each such violation carries a penalty of $500, or $1,500 if intentional.

Defendant's Motion should be denied for the following reasons: (1) Defendant's argument that it does not "make" or "initiate" the subject calls, but rather is only a "connector" of calls is not only factually inaccurate, but because Plaintiff's allegations are accepted as true for the purposes of this Motion, such an argument is irrelevant in the Court's standard of decision; and (2) Defendant's argument that imposition of TCPA liability for its actions would impermissibly conflict with various provisions of the The Telephone Operator Consumer Services Act, 47 U.S.C. § 226 ("TOCSA") at best flow from a fundamental misreading of that statute, and at worst are an intentional misrepresentation of the plain meaning of the TOCSA.

II. STATEMENT OF RELEVANT FACTS

A. SUMMARY OF RELEVANT FACTS FROM PLAINTIFF'S FIRST AMENDED COMPLAINT ("FAC")

Defendant provides a service of making collect calls to cellular telephones. (Plaintiff's First Amended Complaint, "FAC" ¶ 6.) As part of Defendant's business model, a person who wishes to call another individual's cellular telephone (the "Calling Party"), but can not afford the call, calls 1-800-CALL-4-LESS, and informs Defendant of their desire to speak to another party (the "Receiving Party") (Plaintiff's FAC ¶ 6). Defendant then independently places a call to the Receiving Party's cellular telephone, using a prerecorded voice, in an attempt to solicit business

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from the Receiving Party in order to connect a call with the Calling Party. (Plaintiff's FAC, ¶ 6.) When Defendant places a call to the Receiving Party - unknown to the Calling Party - Defendant uses a prerecorded voice in an effort to solicit the business of the Receiving Party by accepting the call. (Plaintiff's FAC, ¶¶ 6-8.) Notably, it is not the Calling Party that calls the Receiving Party, but rather, the Calling Party contacts Defendant - in this case, by dialing 1-800-CALL-4-LESS - and requests that Defendant contact the Receiving Party in order to determine if the Receiving Party is interested in purchasing Defendant's services in order to speak with the Calling Party. (Plaintiff's FAC, ¶ 6.)

On or about May 11, 2010, Plaintiff received a call on his cellular telephone from Defendant. (Plaintiff's FAC, ¶ 7.) This call featured a prerecorded voice which stated "this is the 800-CALL-4-LESS operator. You have a collect call from [the Calling Party's name could not be ascertained by Plaintiff]. To accept the charges, press 1 now." *Id.* Plaintiff never provided any consent - express, implied, or otherwise - to receive this call on his cellular telephone. (Plaintiff's FAC, ¶¶ 9, 10.) Defendant could have easily used a live operator to make these calls, but chose instead to use an automated dialer featuring a prerecorded and/or artificial voice.

III. LEGAL STANDARD IN RULE 12(B)(6) MOTIONS

Pursuant to the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Rules require only that this "statement" constitute a "showing, rather than a blanket assertion of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89 (2007) (quoting *Twombly*, 127 S. Ct. at 1964). A plaintiff's factual allegations need only "be enough to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1965.

It is axiomatic that in deciding a motion to dismiss for failure to state a claim, a district court must "accept as true all the allegations in the complaint and all reasonable inferences than can be drawn therefrom, and view them in light most favorable to the plaintiff." *Burgert v.*

Lokelani Bernice Pauahi Bishop Trust, 200 F. 3d 661, 663 (9th Cir. 2000); *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986). Moreover, the accepted rule is that a complaint is not to be dismissed, "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 350 U.S. 41, 45-46 (9157); U.S. v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1980). Under this rule, it is only the extraordinary case in which a dismissal is proper. *Corsican Productions v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964). Accordingly, "[a] motion to dismiss for failure to state a cause of action is viewed with disfavor and is rarely granted." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986).[1]

Here, Plaintiff clearly states a claim for which relief can be granted. Plaintiff alleges that Defendant made calls to Plaintiff's cellular telephone, featuring a prerecorded voice, that were not for emergency purposes and were without Plaintiff's prior express consent to receive such calls. (Plaintiff's FAC, ¶¶ 6-12.) These allegations are to be accepted as true for the purposes of this Motion. *See, Burgert,* 200 F. 3d at 663; *Gibson,* 781 F.2d at 1337. A large portion of Defendant's Motion simply argues that Plaintiff's allegations - that Defendant made the calls - are not true. Certainly, Defendant is free to make these arguments at a later point in time in a motion for summary judgment. But for the purposes of *this* Motion, these arguments are meritless, because the Court is to assume Plaintiff's allegations are true. Therefore, to the extent Defendant's Motion relies on arguments that Plaintiff's allegations are not true, those arguments are properly disregarded. The remainder of Defendant's Motion, explained in greater detail below, lack foundation in both law and fact, and are similarly disregarded.

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[1] Alternatively, and as further detailed below, because the facts show that at a very minimum, Plaintiff can (assuming Plaintiff has not adequately done so already) plead violations of the TCPA, if this Court finds Plaintiff's pleading to be inadequate, Plaintiff respectfully requests leave to amend. Such circumstances are the norm when it appears that a plaintiff has a viable cause of action, but for one reason or the other, a court finds that such a cause of action was inadequately pled. *Forman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend shall be freely given); In re Morris, 363 F.3d 891, 894 (9th Cir. 2004) (the Ninth Circuit has stressed the policy favoring amendments, holding that a trial court "should be guided by the underlying merits, rather than on technicalities or pleadings").

IV. ARGUMENT

A. DEFENDANT MADE CALLS TO PLAINTIFF'S CELLULAR TELEPHONE

1. Because Plaintiff's Allegations Are To Be Accepted As True, Defendant's Arguments To The Contrary Are Not Ripe For Determination In *This* Motion

As alluded to above, it is axiomatic that in deciding a motion to dismiss for failure to state a claim, a district court must "accept as true all the allegations in the complaint and all reasonable inferences than can be drawn therefrom, and view them in light most favorable to the plaintiff." *See, Burgert,* 200 F. 3d at 663; *Gibson,* 781 F.2d at 1337. Plaintiff has alleged that Defendant made multiple calls to Plaintiff's cellular telephone, featuring a prerecorded voice, that were not for emergency purposes and were without Plaintiff's prior express consent to receive such calls. (Plaintiff's FAC, ¶¶ 6-14.)

While vaguely paying lip service to this fundamental Rule 12 standard, Defendant continues to argue that Plaintiff's allegations are untrue; that Defendant does not "make" the calls. (Defendant's Motion, p. 5.) But this is contrary to what Plaintiff has alleged. Plaintiff alleged that a third-party caller contacted Defendant, and requested that the Defendant call Plaintiff. (Plaintiff's FAC, ¶ 6.) In other words, Plaintiff has alleged that Defendant placed the call. *Id.* This allegation is to be accepted as true for purposes of a motion to dismiss under Rule 12(b)(6). If Defendant wishes to argue the *merits* of Plaintiff's claims, they are free to do so - after adequate discovery in a motion for summary judgement. But the "plaintiff's allegations are not true" argument is simply not ripe for adjudication in *this* Motion.

2. Even If Plaintiff's Allegations Were Not Accepted As True, As A Matter of Fact, Defendant - And Not Some Other Third Party - Makes Calls To Consumer's Cellular Telephones

Defendant makes prerecorded calls to consumers completely independent of third parties. As Defendant has recognized, "[t]he Ninth Circuit has defined the term "call" under the TCPA as meaning to 'communicate with or try to get into communication with a person by telephone.'" *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 954 (9th Cir. 2009). Defendant is the party who clearly "tr[ies] to get into communication with a person by telephone" by actually placing a call to a consumer as a means of soliciting business for its collect-to-cell services.

Defendant's business model operates as follows: (1) a Calling Party contacts Defendant, or in this case, dials 1-800-CALL-4-LESS, and requests the Defendant to place a call to a Receiving Party; (2) Defendant obtains the number the Calling Party wishes Defendant to contact (the Receiving Party); (3) Defendant independently calls the Receiving Party; and finally (4) if the Receiving Party is interested in paying for Defendant's services, Defendant will connect a call between the Calling Party - who is placed on hold while Defendant makes it's own independent call to the Receiving Party - and the Receiving Party. If Defendant were simply a "connector" of the call, the Calling Party would simply contact the Receiving Party directly, and no third party solicitation would be required to connect the call. But implicit in Defendant's "collect-to-cell" operation is that Defendant actually makes an independent call to solicit business from the Receiving Party.

Defendant's attempted analogy between the circumstances of this case and those involving fax broadcasters (Defendant's Motion, p. 6, fn. 1) misses the mark. When a person employs "Kinko's" to send a fax, there is no solicitation involved in the transaction - Kinko's indeed does nothing more than transmit the faxing party's call. This is more analogous to the situation where a person who contracts with "AT&T" to be their telephone service provider makes autodialed calls directly to the consumer, and AT&T simply transmits the calls over its network without any direct involvement in its placement. Under *those* circumstances, there would be no liability for either Kinko's or AT&T. This is not the case here. Defendant does not merely "transmit" or "facilitate" calls - Defendant directly places prerecorded calls independent of third parties. The Calling Party does not make a call to the Receiving Party featuring Defendant's automated prerecorded voice; Defendant makes this call. The Calling Party *calls* Defendant, and requests to make a collect call. Defendant then makes an independent call to solicit business from the Receiving Party.

The appropriate analogy - as far as the factual inquiry of "who makes the call" is concerned - is that of an original creditor who hires a debt collector to collect a debt. The original creditor simply instructed the debt collector to collect the debt (something that is

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perfectly legal) and provided no instructions on how to go about collecting the debt. Subsequently, the debt collector, in attempting to collect the debt, contacts the consumer with an autodialer featuring a prerecorded voice on the consumer's cellular telephone without the consumer's prior express consent to receive such calls. Clearly, such action by the debt collector would be subject to TCPA liability. *See generally, Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946 (9th Cir. 2009). This is true even though, as Defendant has put it, "without the initiating party [the original creditor], there would be no call at all." (Defendant's Motion, p. 5, ln. 13-14.) This is because the debt collector *chose* to utilize unlawful means (violating the TCPA) to accomplish an otherwise lawful end (collecting a debt).

The same is true here. The Calling Party contacted Defendant, and requested Defendant to place a collect call to a Receiving Party (something that is perfectly legal). Subsequently, Defendant made an independent call to Plaintiff's cellular telephone, using a automated or prerecorded voice, in an attempt to solicit payment for Defendant's services of connecting a collect call to the party who initially called Defendant. This call, or more appropriately, this solicitation, was independently initiated by Defendant, without any involvement of the party who initially contacted Defendant. This is true even though, as a practical matter, Defendant was only calling Plaintiff because a third party requested to make a collect call to Plaintiff.

Just because Defendant would have never made the call but for the calling party's request to make a collect call does not mean that Defendant never made the independent prerecorded call, and it certainly does not mean that someone else, i.e., the calling party, made the call. Defendant made these calls. Defendant makes solicitation calls, with the incentive of obtaining compensation for their services if a collect call is successfully placed. Defendant's actions, just as those of the debt collector described above, violate the TCPA because Defendant *chose* to utilize unlawful means (making a solicitation call with an artificial or prerecorded voice to a cellular telephone), when other lawful options were available (such as a live operator), to accomplish an otherwise lawful end (placing a collect call).

B. Defendant's Collect-to-Cell Business Clearly Falls Within the Purview of the TCPA

The language of the TCPA clearly prohibits the calls at issue. 47 U.S.C. § 227(b)(1)(A)(iii) provides that it is illegal to: "(A) make ***any call*** (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice" to a cellular phone service. (emphasis added.) In the FCC's 2003 Report and Order, 68 F.R. 44144, 44165, 18 FCC Rcd. 14104, 14115 (FCC 2003), the FCC again confirmed that any autodialed or prerecorded voice calls to wireless numbers are strictly forbidden under the TCPA, unless the call falls under one of the few "limited exceptions":

> We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, 'to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.' . . . Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls.

See, Id. Most recently, in the FCC's 2008 Report and Order, the FCC again confirmed that "it is unlawful to 'make *any call* using an automatic telephone dialing system or prerecorded message to any wireless telephone number."

The plain language of the TCPA prohibits Defendant from using prerecorded voices to solicit business from consumers with a prerecorded voice for its collect-to-cell operation. There is no exception to the TCPA that would permit entities such as Defendant to circumvent this rule. The fact that there is no exception permitting such calls, in and of itself, demonstrates that such an exemption was never intended. *See, Clark v. Capital Credit & Collection Serv's., Inc.,* 460 F.3d 1162, 1169 (9th Cir. 2006); *In re Gerwer,* 898 F.2d 730, 732 (9th Cir. 1990) (The Ninth Circuit has consistently held under the doctrine of *expressio unius est exclusio alterius* that "[t]he express enumeration [of an exemption] indicates that other exceptions should not be implied.")

Notably, because consumers are charged at least one minute of air-time just for picking up Defendant's solicitation, such a call *can not be exempted from the TCPA* - even if at some later date in the future, the FCC wanted to create such an exemption. *See,* 2008 TCPA Order ("section 227(b)(2)(C) gives the Commission authority to exempt from the prohibition on autodialed or prerecorded message calls to wireless numbers contained in section 227(b)(1)(A)(iii) only those "calls to a telephone number assigned to a cellular telephone service that ***are not charged*** to the called party.") (emphasis added). In other words, the FCC only has the authority to create additional exemptions not provided for by Congress when the party is not charged for the call. Here, Plaintiff is charged at least one minute of air-time just to answer Defendant's solicitation. Accordingly, not only is there currently no exception permitting Defendant's activities, but no such exception *could* exist unless it came directly from Congress.

In cherry-picking out-of-context passages from FCC opinions, Defendant argues that Congress did not intend to regulate "carriers" or "facilitators" such as Defendant (Defendant's Motion, p. 6, fn. 1.) The context of Congress' sentiment here, obviously, is that carriers or facilitators who do not actually place any calls are not responsible for people for violate the TCPA using the carrier's or facilitator's services. *See,* Remarks of Sen. Hollings, 137 Cong. Rec. S. 18780 (November 27, 1991) ("It is not our intent that a carrier should be held liable for transmitting over the carrier's network any call or message in violation of this legislation ***made by an entity other than the carrier.*** This intention is consistent with our policy that carriers should not be responsible for the content of messages delivered over their networks.") (emphasis added.) Surely, Congress did not intend to allow entities masquerading as mere "facilitators" to place their own calls in violation of the TCPA.[2] Congress simply expressed the notion that carriers and

[2] Defendant's argument that "[t]here is no evidence that in enacting the TCPA Congress intended to regulate operator services relating to collect calls", Defendant's Motion, p. 4, ln. 17-18, is meritless. First, the Ninth Circuit has consistently held under the doctrine of *expressio unius est exclusio alterius* that "[t]he express enumeration [of an exemption] indicates that other exceptions should not be implied." *See, Clark v. Capital Credit & Collection Serv's., Inc.,* 460 F.3d 1162, 1169 (9th Cir. 2006); *In re Gerwer,* 898 F.2d 730, 732 (9th Cir. 1990). There are several enumerated exceptions to TCPA liability; the placement of solicitations for collect call services is not one of them. Furthermore, it would be impossible to anticipate, and unreasonable to expect in legislative drafting, that every conceivable action that would constitute a violation of a given law be specifically codified. *See People ex rel. Mosk v. National Research Co. of California,* 201 Cal. App. 2d 765, 772 (1962) ("it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair . . . business practices may run the gamut of human ingenuity and chicanery"). This is why Congress simply states that a general set of actions violate the TCPA (here, any placing of **any** call to a telephone number assigned to a cellular service featuring a prerecorded voice).

facilitators can not control individuals who utilize prerecorded voices and autodialers over their network, thus, it would not stand to reason to hold these carriers liable when these other individuals take such actions. But it is not another party using a prerecorded voice over Defendant's network here. Indeed, Defendant doesn't have a network, nor is Defendant properly understood as a "carrier." Rather, Defendant's entire operation consists solely of an automated service which solicits business from consumers via a prerecorded voice to place collect calls to their cellular telephones. It is Defendant's *choice* to use a prerecorded voice, rather than a live operator, that results in TCPA liability.

C. Defendant's Argument That Enforcing the TCPA Against Defendant Conflicts With The Telephone Operator Consumer Services Improvement Act Is Meritless

There is no conflict between Section 227 and Section 226(b) of the Federal Communications Act. Section 226(b) only regulates those collect calls where the party *who desires to make the collect call* is going to be billed for placing the call, and provides the various disclosures that must be made *to the party who contacts an operator.* Section 226(b) in no way relates to collect calls where the party receiving the call is to be billed for the call, nor does Section 226(b) provide any disclosures that must be made to the party receiving the call. This distinction between these two types of collect calls is critical, because in the circumstances contemplated by Section 226(a), there is no solicitation by a prerecorded voice inquiring into whether the receiving party would like to pay for an entity such as Defendant's services to receive the call. This is because the call is already paid for - the calling party contacts the operator, pays for the call, and the call is directly placed to the receiving party, without any intermediary solicitation or prerecorded voice. In other words, when the call is finally placed to the Receiving

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party, the Calling party is on the other line, not a prerecorded voice soliciting payment to receive the call.[3]

A plain reading of Section 226(b) - with a basic understanding of the definitions provided in Section 226(a) - demonstrates that this Section is only intended to regulate collect calls where the person *contacting* the operator is billed for the call - not the person receiving the call. Section 226(b) provides, in relevant part, as follows:

> "[E]ach provider of *operator services* shall, at a minimum - (A) identify itself, audibly and distinctly, to the *consumer* at the beginning of each telephone call and before the *consumer* incurs any charge for the call; (B) permit the *consumer* to terminate the telephone call at no charge before the call is connected; (C) disclose immediately to the *consumer*, upon request and at no charge to the *consumer* - [various disclosures].[4]

47 U.S.C § 226(b) (emphasis added). The essential terms that need to be defined here are "operator services", and "consumer".

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[3] If there is any application of 226(b) to Defendant's collect-to-cell operation at all, it could only conceivably relate to the regulations and disclosures that must be made *to the party contacting Defendant.* As discussed above, *supra* Sections IV.A.2, there are two calls involved in Defendant's collect-to-cell business. In the first call, the Calling Party contacts Defendant and requests to be connected to a given number (in this case, the individual contacts Defendant by dialing 1-800-CALL-4-LESS). The second call - the call at issue in this class action - is where the Defendant makes an independent prerecorded solicitation to the Receiving Party to inquire if they are interested in paying for Defendant's services in order to receive a call from the person who initially contacted Defendant (the Calling Party). While it should be plain that Section 226(b) does not in any way apply to Plaintiff's claims, if there is any application at all, it only regulates the first call, i.e., the call placed from an individual to the Defendant, whereas Section 227 regulates the second call, i.e., the call from Defendant to Plaintiff. Accordingly, there is no conflict in having 226(b) regulate the first call, and Section 227 regulate the second call. This notion is highlighted by Section 226(i), which, under the heading **Statutory Construction,** provides that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under other sections of this chapter." Thus, there can be no conflict.

[4] Notably, while not alleged in this case because Section 226(a) has no application to collect calls where payment is solicited by the receiving party, even if Section 226(b) was deemed to regulate the first of two calls required to make a collect call under these circumstances, Defendant has plead itself into additional liability, as Plaintiff's investigation into the facts and circumstances of this case have revealed that Defendant does not make the disclosures required by 226(b) to either the calling party or the receiving party. Presumably, Defendant does not make these disclosures through its 1-800-CALL-4-LESS business because Section 226(b) does not apply.

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Section 226(a)(7) defines "operator services" as "any interstate telecommunications service initiated from an *aggregator* location that includes, as a component, and automatic or live assistance to a *consumer* to arrange for billing or completion, or both, of an interstate telephone call . . ." (emphasis added.) Section 226(a)(2) defines the term "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator service." Section 226(a)(4) defines "consumer" as "a person *initiating* any interstate telephone call using operator services." (emphasis added.) It is important to make very clear here that the "consumer" here is the person who contacts Defendant (the Calling Party) - not the person who Defendant calls at the request of this "consumer" (the Receiving Party).[5] This distinction makes all the difference because when it is the person *contacting* entities such as Defendant who are billed for the call, the call that is ultimately placed is done so directly. In other words, there is no intermediary such as Defendant that needs to place a call to the receiving party to inquire if they are willing to pay for their services - their services have already been paid for.

Defendant's argument that "the TOCSIA specifically contemplates that a provider of operator services may provide its service using 'automated' assistance, Defendant's Motion, p. 7, ln. 23-24, to *these* circumstances is a red herring predicated on language that, if argued in an improper context (as Defendant has done here), gives the false impression that the calls at issue are regulated by Section 226. In the context of calls contemplated by Section 226, of course automated operator services are treated in the same vein as live operator services. This is because the person who has to deal with the prerecorded voice in the circumstances contemplated by Section 226 *contacts the operator.* Obviously, the TCPA does not regulate *consumers contacting prerecorded voices,* but rather, regards prerecorded voices contacting consumers on their cellular telephones - which is what Plaintiff's claims are all about.

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[5] Defendant's attempt to define "consumer" by citing to to 47 C.F.R. § 64.708(b), thereby including both the Receiving Party and the Calling Party within its purview, is incredibly misleading. As discussed above, the term "consumer" is clearly defined within the very statute Defendant claims conflicts with the application of the TCPA to its collect-to-cell business. Furthermore, a reading of the TOCSIA as a whole clearly demonstrates that this statutory scheme only regulates the disclosures and practices related to live and automated operator dealings with Calling, and not Receiving Parties. As noted above, the reason for this distinction is obvious: There is no solicitation involved when a consumer calls an automated operator - the consumer voluntarily chose to contact the operator. This is not the case here, and this is why the TOCSIA does not apply. Defendant's business model requires Defendant to solicit business from an unsuspecting party - these calls fall within the purview of the TCPA. The Court should refrain from entertaining Defendant's remarkable gamesmanship.

V. CONCLUSION

While Defendant claims that they are only the "facilitator" and do not "make" the calls, this is clearly not the case. Surely it was not the Calling Party's prerecorded voice on the other line. Facilitators only transmit messages, or provide a service so others may transmit their messages over the facilitator's network. Mere facilitators do not solicit business from a recipient as a precondition to receiving a call. And this is what Defendant's calls to Plaintiff were - solicitations. Defendant's alternative argument that Section 226 should preclude application of Section 227 to the subject calls is meritless, as the clearly defined terms of Section 226 show that it does not apply to the calls at issue.

Plaintiff filed this class action alleging Defendant has illegally called persons on their cellular telephones with a prerecorded voice, practices prohibited by the Telephone Consumer Protection Act. Defendant's protestations about the fairness of the statute and remedies notwithstanding, the TCPA is the law and has been since 1991, without any of the restrictions on enforcing the statute suggested by Defendant. It's not as though Defendant can't conduct its business any other way; live operators have been used for decades in the collect call business. Defendant is free to make these solicitations through a live operator, but chose not to do so. To indulge Defendant's sophistry would accomplish little more than competitively disadvantage every other company who chose not to break the law.

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Date: November 16, 2010

By:/s/ David C. Leimbach
David C. Leimbach
Attorneys for Plaintiff